

In The Matter Of:

MARC S. KIRSCHNER, et al.

v.

PHILLIP R. BENNETT, et al.

TELEPHONIC CONFERENCE - Vol. 1

November 11, 2011

CONFIDENTIAL

MERRILL CORPORATION

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Page 1

C O N F I D E N T I A L

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re REFCO, INC. Securities Litigation

MARC S. KIRSCHNER,
As Trustee of the Refco Private Actions
Trust,

Plaintiff,

vs.

PHILLIP R. BENNETT, SANTO C. MAGGIO
ROBERT C. TROSTEN, MAYER, BROWN LLP,
MAYER BROWN INTERNATIONAL LLP,
and GRANT THORNTON LLP,

Defendants.

07 MDL 1902 (JSR)
07 Civ. 8165 (JSR)

-----x
November 11, 2011

11:00 a.m.

TELEPHONIC CONFERENCE BEFORE:

RONALD J. HEDGES, Special Master

Reported by: Mark Richman, CSR, RPR

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Page 26		Page 28	
1	CONFIDENTIAL	1	CONFIDENTIAL
11:19:36 2	yet?	11:21:01 2	going to have to go forward and we
11:19:36 3	MR. RAND: I do know, judge.	11:21:02 3	understand that.
11:19:38 4	I'm happy to enter into this. I	11:21:03 4	And what's going on really, I
11:19:41 5	enter with some trepidation because	11:21:04 5	think, is that Grant Thornton wants
11:19:43 6	I view this now as somewhat on the	11:21:06 6	to drive this out, make it very
11:19:45 7	substantive side and akin to	11:21:08 7	expensive, delay things and not let
11:19:46 8	summary judgment arguments that I	11:21:10 8	us go forward. If we are able to
11:19:48 9	expect Grant Thornton will make and	11:21:12 9	prove it up, well we all know
11:19:49 10	that day will come and we will be	11:21:13 10	what's going to happen. That's our
11:19:51 11	in front of Professor Capra and	11:21:14 11	burden.
11:19:53 12	Judge Rakoff on it.	11:21:14 12	MS. JOYCE: There is another
11:19:54 13	But simply put I would say	11:21:17 13	issue, Special Master Hedges.
11:19:57 14	this. Every single FX customer who	11:21:17 14	SPECIAL MASTER: Hold on one
11:19:59 15	has been deposed and will offer	11:21:18 15	second, Ms. Joyce. I'm just having
11:20:01 16	testimony has said had I known that	11:21:20 16	trouble understanding why you need
11:20:03 17	RCM was not a going concern, was	11:21:21 17	depositions to disprove something
11:20:06 18	insolvent or had financial	11:21:23 18	that according to you there's no
11:20:08 19	irregularities or the auditor	11:21:24 19	evidence on.
11:20:10 20	provided a qualified audit opinion,	11:21:25 20	MS. JOYCE: There's a separate
11:20:13 21	which this auditor didn't in	11:21:26 21	issue also on damages. The Trustee
11:20:14 22	unbelievable derogation of its	11:21:28 22	has taken the position that, and
11:20:16 23	obligations, if I had known that I	11:21:31 23	he's actually served his expert
11:20:18 24	never would have allowed my money	11:21:33 24	report on damages and has taken the
11:20:20 25	to move to RCM from where I was or	11:21:34 25	position that it is Grant
Page 27		Page 29	
1	CONFIDENTIAL	1	CONFIDENTIAL
11:20:22 2	I never would have allowed it to go	11:21:37 2	Thornton's burden to put forward
11:20:23 3	from Cargill to where it was and	11:21:40 3	evidence on mitigation of damages.
11:20:25 4	Cargill has said they never would	11:21:42 4	So his expert is going to put
11:20:27 5	have done the deal.	11:21:44 5	in testimony related to what the
11:20:28 6	And so, respectfully, I don't	11:21:47 6	allowed claims were here and has
11:20:29 7	think we have this causation	11:21:50 7	not offered up any work or any
11:20:30 8	problem. I don't think any more	11:21:54 8	testimony with regard to what the
11:20:32 9	deposition testimony is going to	11:21:57 9	actual recoveries were here or
11:20:33 10	elicit what Grant Thornton	11:22:00 10	set-off amounts.
11:20:36 11	proffered that it thought it was	11:22:01 11	And the Trustee has taken the
11:20:36 12	going to get somehow from these	11:22:03 12	position that it's Grant Thornton's
11:20:39 13	customers, which is somehow they	11:22:04 13	burden to move forward on proving
11:20:39 14	would have stayed at RCM or used	11:22:08 14	what in fact was mitigated.
11:20:41 15	RCM if they had known RCM was	11:22:10 15	We learned in the deposition
11:20:43 16	hopelessly insolvent which I think	11:22:12 16	of Stilton for the first time that
11:20:45 17	is a completely untenable position,	11:22:17 17	there was a settlement agreement
11:20:48 18	counterlogical, irrational.	11:22:19 18	between Stilton and Cargill. We
11:20:49 19	And ultimately I think, judge,	11:22:21 19	would have never have known that
11:20:51 20	you've hit the nail on the head	11:22:24 20	information.
11:20:53 21	which is that it is cumulative and	11:22:24 21	And I think and maybe I'm
11:20:54 22	duplicative and ultimately if there	11:22:24 22	speaking out of turn here, but I
11:20:57 23	are problems in proof, it's our	11:22:26 23	think that counsel for the Trustee
11:20:59 24	problems.	11:22:27 24	learned for the first time at that
11:21:00 25	We're the plaintiff and we're	11:22:29 25	deposition that there was actually

8 (Pages 26 to 29)

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TELEPHONIC CONFERENCE - 11/11/2011

Page 38		Page 40	
1	CONFIDENTIAL	1	CONFIDENTIAL
11:27:59 2	I appreciate Grant Thornton's	11:29:45 2	not allowing depositions on
11:28:01 3	argument that the depositions of	11:29:47 3	liability but allowing them on
11:28:03 4	the remaining FX customers are	11:29:48 4	damages, include the bifurcation,
11:28:06 5	necessary to prove reliance. I	11:29:51 5	include the close of discovery.
11:28:08 6	disagree. It appears to me that	11:29:53 6	Now, when are all the expert
11:28:11 7	that is an obligation that the	11:29:56 7	reports going to be closed?
11:28:12 8	plaintiff has.	11:29:58 8	MR. RAND: We've already
11:28:14 9	I will give the plaintiff an	11:29:59 9	provided our expert reports to
11:28:15 10	opportunity until November 21 to	11:30:01 10	Grant Thornton. Grant Thornton is
11:28:19 11	identify any customers who the	11:30:02 11	providing its expert reports back
11:28:21 12	Trustee plans to present at trial,	11:30:04 12	to us on December 12th, with the
11:28:24 13	and also to identify any customers	11:30:08 13	exception of the damages expert
11:28:27 14	who must be gone to for	11:30:09 14	which will be 20 days, Grant
11:28:29 15	authentication purposes.	11:30:12 15	Thornton will provide their damages
11:28:31 16	Mr. Rand I believe agrees with	11:30:13 16	expert 20 days after the last FX
11:28:35 17	me, and whether he does or not, I	11:30:16 17	customer is taken and pursuant to
11:28:37 18	think it's correct that that burden	11:30:19 18	your ruling today, judge, on
11:28:38 19	of proof is on the Trustee and that	11:30:20 19	liability as it were, and then we
11:28:42 20	additional depositions frankly are	11:30:22 20	have 20 days to provide a reply.
11:28:44 21	unnecessary unless the plaintiff,	11:30:24 21	The reason we asked and agreed
11:28:46 22	unless the Trustee can put proofs	11:30:26 22	upon the Trustee providing a reply
11:28:49 23	on as to reliance.	11:30:29 23	expert report on damages was so the
11:28:50 24	So for the purposes of	11:30:31 24	parties would essentially at least
11:28:51 25	liability, I will not allow	11:30:32 25	have an opportunity to join issue
Page 39		Page 41	
1	CONFIDENTIAL	1	CONFIDENTIAL
11:28:53 2	additional depositions of FX	11:30:33 2	because of these mitigation
11:28:55 3	customers to be taken, if for no	11:30:35 3	discussions and issues that have
11:28:58 4	other reason then I think it's	11:30:36 4	been going around, so the experts
11:29:00 5	unreasonable and unnecessary under	11:30:38 5	wouldn't be talking past each other
11:29:02 6	rule 26 (b)(2)(c).	11:30:40 6	completely.
11:29:03 7	With regard to damages, based	11:30:40 7	SPECIAL MASTER: The damage
11:29:06 8	on the arguments of counsel, it	11:30:42 8	reports are adjourned without date
11:29:08 9	appears to me that the deposition	11:30:43 9	pending completion of the liability
11:29:10 10	testimony of all of the FX	11:30:44 10	trial. We don't need those for
11:29:12 11	customers may be necessary and may	11:30:48 11	trial now.
11:29:14 12	not be, as we go forward and get	11:30:50 12	Now, everything's going to be
11:29:16 13	all the expert reports in.	11:30:52 13	done then in a relatively early
11:29:18 14	I will bifurcate trial on	11:30:54 14	date. Is everyone planning on
11:29:20 15	liability and damages. If there is	11:30:56 15	deposing experts?
11:29:23 16	a need to take depositions of FX	11:30:57 16	MR. RAND: Yes, judge. We set
11:29:26 17	customers for purposes of damages,	11:30:59 17	January 27th as the expert
11:29:29 18	and that's what I understand we're	11:31:01 18	deposition cut off.
11:29:31 19	talking about with mitigation, I'll	11:31:05 19	SPECIAL MASTER: I'm just
11:29:33 20	address that later.	11:31:06 20	checking to make sure. I've got
11:29:35 21	Your fact discovery, all the	11:31:08 21	that order in front of me. I want
11:29:37 22	fact discovery and wrapping	11:31:09 22	to make sure we're not changing
11:29:39 23	everything up in this case is	11:31:11 23	anything.
11:29:41 24	closed by December 31.	11:31:11 24	Now, summary judgment motions.
11:29:43 25	Mr. Rand, you can include my	11:31:14 25	It sounds as if we should be -- now

11 (Pages 38 to 41)

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